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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 385

DISTRICT OF COLUMBIA, *Petitioner,*

vs.

HAMILTON NATIONAL BANK OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, a municipal corporation, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED.

There were two separate appeals to the United States Court of Appeals for the District of Columbia Circuit in this case. The writ here sought is to review the decision in the second or later appeal. However, in order to fully

Please see page 12 for question presented.

understand the case, it is believed that a review of the facts prior and subsequent to the first appeal is essential.

All the statutes involved in this proceeding were enacted by the Federal Congress in the exercise of its exclusive power to legislate for the District of Columbia under Art. I, Sec. 8, Cl. 17, of the Federal Constitution.

An act of Congress of July 1, 1902 (codified as Sec. 47-1701, D.C. Code, 1940, and hereinafter referred to as "Sec. 1701"),[1] which was enacted by the Congress in 1902, imposes a tax of 6% upon the gross earnings of "Each national bank * * * and all other incorporated banks and trust companies in the District of Columbia." Another portion of the 1902 statute provided for a different method of taxing "Savings banks having no capital stock and paying interest to their depositors," which is now codified as the first paragraph of Sec. 47-1703, D.C. Code, 1940.[2]

By an Act of April 28, 1904,[3] Congress added to the District bank tax statutes what is now codified as the second paragraph of Sec. 47-1703, D. C. Code, 1940 (hereinafter referred to as "Sec. 1703"). It provides that "Incorporated savings banks paying interest to their depositors" shall pay upon their gross earnings, less the sums paid as interest to their depositors, an annual tax of 4%. In the words of the Court below, this amendment "had the obvious effect of giving to 'incorporated savings banks paying interest to their depositors' more favorable tax treatment than that which § 1701 gives to 'each national bank and all other incorporated banks and trust companies'" (R. 108).

The several banks of the District of Columbia include not only national banks but other banks incorporated under the laws of the District of Columbia or of one of the States, which are hereinafter referred to as "non-national banks." Each of the non-national banks conducts, as does respondent, a commercial banking business and also has, as has re-

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[1] See p. 16, *infra*.
[2] See p. 17, *infra*.
[3] 33 Stat. 564, ch. 1815. See p. 17, *infra*.

spondent, substantial savings deposits upon which it pays interest. Both national and non-national banks in the District of Columbia are under the regulatory control of the Comptroller of the Currency. For many tax years prior to the tax year here involved, the taxing authorities of the District classified the non-national banks as "incorporated savings banks paying interest to their depositors" under the second paragraph of Sec. 1703, and collected taxes from them at the rate therein prescribed. For many tax years prior to and including the tax year here involved, the taxing authorities have classified national banks in the District, including respondent, for taxation under Sec. 1701, and assessed taxes against them at the rate therein prescribed. (R. 108.)

Sec. 1701 requires national banks, *inter alia*, in the District of Columbia to file annual reports of gross earnings with the Assessor. On August 1, 1944, respondent, Hamilton National Bank (hereinafter referred to as "Hamilton"), filed a report showing therein as its gross earnings the sum of $501,953.47. In computing that figure Hamilton had deducted from gross earnings the interest paid by it to depositors on time and savings deposits, totaling $76,982.83. On September 1, 1944, the Assessor disallowed the said deduction of $76,982.83 and presented to Hamilton a bill for taxes on the gross earnings reported plus the deduction disallowed, or a total of $578,936.30. The additional tax amounted to $4,618.97. (R. 122, 137.)

Hamilton paid the tax on September 15, 1944, under protest in writing, and thereafter seasonably filed its petition with the Board of Tax Appeals for the District of Columbia (hereinafter referred to as the "Board") for a reduction of the amount of the assessment by such amount as represented the additional taxes on the sum of $76,982.83, upon the ground that the Assessor had erred in refusing to allow it to deduct from its gross earnings the interest paid during the year to its savings depositors (R. 127). At

the hearing Hamilton introduced evidence proving that certain incorporated non-national banks, which carried on a savings and commercial banking business in the District of Columbia similar to that done by Hamilton, had been permitted by the Assessor to deduct interest paid depositors on time and savings deposits in computing their gross earnings for tax purposes. Hamilton contended that it had as great a right to make such deduction as those banks. (R. 133.) Hamilton did not claim the right to the 4% rate of tax provided by Sec. 1703 (R. *passim*). Quite to the contrary, as counsel for Hamilton later stated, all that Hamilton asked for "in this case is a deduction * * * of the interest * * * paid the savings depositors (R. 76). Hamilton further contended that, as to its time and savings accounts, it is a savings bank and that, as an incorporated savings bank, it is authorized by the Act of 1904 to deduct from gross earnings the interest paid depositors (R. 131).

On December 3, 1945, the Board entered its findings of fact, opinion and decision (R. 126-134). In its opinion the Board held that Hamilton could not deduct the interest paid by it on savings deposits from its gross earnings for tax purposes under Sec. 1701 (R. 129-131).

The Board rejected Hamilton's second contention, holding that a national bank does not become a savings bank by accepting savings deposits (R. 131), that Congress had in its bank tax enactments, differentiated between national banks and savings banks (R. 132), and that Hamilton, having been properly assessed, could not complain that other banks similarly situated are not sufficiently taxed (Ap. 133) [Under a different section of the statute].

THE FIRST APPEAL.

On December 28, 1945, Hamilton filed a petition for review by the United States Court of Appeals for the District of Columbia Circuit of the decision of the Board (R. 134).

On appeal,[4] Hamilton made three contentions (p. 30, *infra*). The Court rejected the first and third contentions of Hamilton (pp. 30, 37, *infra*). Hamilton's first contention was that interest paid its depositors on savings accounts is deductible in computing gross earnings for tax purposes. In rejecting this contention the Court said that it agreed with the Board that "this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings" (p. 31, *infra*). The third contention of Hamilton was that the tax in controversy was a discrimination violative of Sec. 5219 of the Revised Statutes (12 U.S.C.A., Sec. 548). The Court below pointed out that that statute is addressed to the legislatures of the States, and the statutes involved in this case are Acts of the Federal Congress. However, the Court was of opinion that Sec. 5219 was of value in this case as an indication of Congressional policy, and that to that extent Hamilton's third contention was sound. (p. 37, *infra.*)

The second contention of Hamilton, as stated by the Court of Appeals, was that "the difference in treatment accorded by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon" Hamilton (p. 32, *infra*). It was under this second contention of Hamilton that the first appeal was decided by the Court of Appeals.

The Court of Appeals found that discriminations were "presently existing" against Hamilton (p. 37, *infra*). The Court dispelled any idea that those discriminations were in the statutes themselves, saying that:

> "* * * It is apparent that the 1904 act was intended to subject incorporated savings banks to

[4] The opinion of the Court of Appeals in the first appeal is reproduced as an appendix to this petition and brief for the convenience of this Court (pp. 29-37, *infra*).

> a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore valid. * * *" (p. 32, *infra*.)

This being so, the Court then considered the question of discrimination in "administrative action" (p. 32, *infra*).

With reference to the administrative action, the Court said that it did not think that "the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank" (p. 32, *infra*). The Court said that the answer to the question of what is a savings bank must be reached "by viewing what was actually done," and that "Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary" (p. 33, *infra*). Presumably, the test which the Court spoke of as being arbitrary was the administrative action in assessing national banks under Sec. 1701 where they are specifically designated, and taxing non-national banks under Sec. 1703 consistently with long administrative interpretation (R. 110). The administrative authorities later taxed the non-national banks under Sec. 1701, but that action was set aside by the Board (R. 109).

Having found the administrative action to be "arbitrary", the Court said that the next question was "whether the administrative action is so improper as to be invalid" (p. 33, *infra*). In discussing this question the Court had occasion to state that:

> "* * * The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capri-

> cious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment. But we are not considering the validity of an act of Congress and need not go into the question whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. * * *" (pp. 33, 34, *infra*).

In disposing of the case, the Court reversed the decision of the Board and remanded the case with instructions to cancel the assessment against Hamilton unless the tax Assessor, upon a reexamination of the entire subject of taxing banks in the District, removed the discriminations "presently existing", and said that if the tax Assessor did so "the validity of his further proposals may be considered" (p. 37, *infra*).

After remand, the Assessor of the District of Columbia reexamined the entire subject of taxing banks in the District of Columbia and concluded that there is no bank in the District which qualifies as an incorporated savings bank paying interest to its depositors for purposes of classification and taxation under the provisions of the second paragraph of Sec. 1703. He proceeded, accordingly, to tax all banks in the District, both national and non-national, at the higher rate of taxation provided by Sec. 1701. (R. 109.) The banks so assessed constituted all the banks engaged in business in the District during that fiscal year, other than national banks and trust companies (R. 96). Thereafter the non-national banks appealed to the Board from the additional taxes assessed against them as aforesaid, upon the principal ground that the Assessor had erroneously determined that they were not incorporated savings banks subject to tax under Sec. 1703. Upon appeal to it, the

Board held that the appealing non-national banks were properly subject to tax only under Sec. 1703, and accordingly ordered refunds of the amounts assessed as additional taxes under Sec. 1701. From the decisions of the Board in the seven cases of the non-national banks, the District appealed to the Court below. (R. 109.)

Subsequent to the decisions in the cases of the seven non-national banks, the Board considered the case of Hamilton and concluded, as matters of law, (1) that the discriminations found by the Court of Appeals upon its review in the first case had been removed and (2) that the decision of the Board in the first appeal of Hamilton to it should not be set aside (R. 99, 100). In reaching its first conclusion of law, the Board was of the view that in its opinion in the first *Hamilton* case the Court of Appeals had held (R. 101, 102):

> "* * * that the application of the more favorable taxing method to the state-chartered banks did not of itself operate to entitle the national banks to be taxed by the same method, but only that the application of the more favorable methods to such banks merely by reason of the nature of their charters rather than upon a consideration of the character of the business done by them, was such as to require a cancelation (sic) of the assessment against the petitioner herein unless the discriminatory method used in arriving at the method of taxation of these other banks were corrected."

and stated that:

> "In using the expression 'discriminations presently existing', the Court seems to have had in mind the methods of the Assessor in arriving at his conclusions, rather than the conclusions themselves. The methods thereupon adopted by the Assessor in determining the taxable status of the

state-chartered banks do not fall within the condemnation of the Court's ruling. The fact that his reversal of his previous action was in turn reversed by this Board, upon a consideration of the methods of doing business of the state-chartered banks, rather than the nature of their charters, was not a restoration of the discrimination which had caused the Court to reverse the previous action of the Board."

THE SECOND APPEAL.

Thereupon Hamilton filed its petition for review by the Court below of the Board's decision in its case (R. 109).

All eight cases (Hamilton and the seven non-national banks) were argued in the Court of Appeals on the same day and were disposed of in a single opinion (R. 107).

The disposition of the cases by the Court below may be summarized by the following quotation from the opinion:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in § 1703, the national banks in the District which have interest-bearing savings deposits must be classified and taxed in the same manner. The order of the Board of Tax Appeals in the Hamilton National Bank case will be set aside." (R. 113.)

From the foregoing quotation it might, at first blush, appear that the taxing authorities had power to classify the non-national banks as "other incorporated banks" for tax purposes under Sec. 1701. Such, however, is not the case, for the Court expressed the opinion that "the Board of Tax Appeals was justified in holding the state-chartered

banks to be taxable under § 1703 as incorporated savings banks" and, accordingly, affirmed the decisions of the Board in the cases involving those banks (R. 111), thereby precluding the possibility of taxing the non-national banks under Sec. 1701 .

With respect to the *Hamilton* case, the decision of the Court below rejected the contention of the District Government that Congress had power to classify national banks for tax under Sec. 1701 at a higher rate of tax than that provided for incorporated savings banks under Sec. 1703, and that it had done so, saying that that argument is "fallacious" upon the theory that it was the Board of Tax Appeals and not the Congress which discriminated against the national banks (R. 111). It appears that the bases of the decision of the Court below with respect to Hamilton are the assumptions, which we believe to be erroneous, that (1) Congress did not intend national banks to be taxed under Sec. 1701 (R. 111, 112), and (2) even if Congress did intend such taxation of national banks Sec. 1701 would be invalid because it denies to national banks "the due process guaranteed by the Fifth Amendment and the equal protection of the laws implied therein for the benefit of the inhabitants of the District of Columbia." (R. 112.) Our reasons for disagreeing with these assumptions are set forth in the brief in support of this petition (pp. 18-37, *infra*).

Judge Edgerton was in disagreement with the theory of the majority that Congress did not intend to tax national banks under Sec. 1701 or that if it did have that intention, Sec. 1701, insofar as the same taxes national banks, is invalid. He stated that "the statute and its history show that Congress intends state banks that do a savings business to be taxed under § 1703 although they also do a commercial business, but intends national banks, which are ex-

pressly named in § 1701, to be taxed there although they also do a savings business." To him, as it is to counsel for this petitioner, "The power of Congress to tax state banks and national banks differently" is "as plain as the power to tax corporations and partnerships differently." (R. 113.)

Moreover, Judge Edgerton was of opinion that even if the constitutionality of the statute were not plain, it could not be drawn in question in this case in the Court below, since that Court is a Court of the United States and since there had been no compliance with Title 28, Sec. 2403, of the United States Code, which requires:

> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * * " (R. 113.)

In these circumstances, the District is petitioning this Court for a writ of certiorari in the cases of the seven non-national banks [5] as well as in the instant one.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 31, 1949 (R. 114). The petition for rehearing before the full Court was filed June 14, 1949, and denied July 20, 1949 (R. 116). The jurisdiction of this Court to issue the Writ applied for

[5] Nos. 40 ~~through~~, October Term, 1949.

is invoked under Title 28, U.S. Code, Sec. 1254 (Act of June 25, 1948, 62 Stat. —, ch. —).

QUESTION PRESENTED.

The general question presented is whether the Fifth Amendment to the Federal Constitution affords equal protection of the laws under statutes enacted by the Federal Congress to apply in the District of Columbia pursuant to Art. I, Sec. 8, Clause 17, of the Constitution.

The specific question is as follows: If, in the exercise of its exclusive power to legislate for the District of Columbia, the Congress classified national banks in the District of Columbia for taxation at a higher rate than incorporated savings banks, and if, at the time of the enactment of the statute, such classifications rested upon reasonable differentials, would the fact that subsequently both types of banks (assuming, *arguendo,* but not conceding, that the non-national banks are incorporated savings banks within the meaning of Sec. 1703) were engaged in substantially the same types of business render an assessment made against a national bank at the higher rate invalid upon the theory that the statute falls before the Fifth Amendment because it denies due process or equal protection of the laws to national banks?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia Circuit has decided a question of substance relating to the construction and application of the Constitution of the United States and statutes enacted by the Congress which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has not given proper effect to the decisions of this Court with respect to the legislative power of the Federal Congress.

This Court has held that the Fifth Amendment to the Federal Constitution contains no equal-protection clause and that a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under that Amendment; but the Court below has declared in this case that the Fifth Amendment as applied to the District of Columbia implies equal protection of the laws, and that inequality in the incidence of a tax imposed by the Federal Congress upon taxpayers engaged in the same type of business renders a statute unconsitutional upon the theory that the statute denies due process and equal protection of the laws under the Fifth Amendment.

3. The question presented in this case is applicable not only with respect to determining the constitutionality of the particular statute involved but also to every statute enacted by the Federal Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia.

4. The question is of general importance. The questions presented in this case and in the cases of the seven non-national banks hereinbefore mentioned will affect not only those banks but every bank in the District of Columbia. In the words of the Court below in the first appeal in this case: "The interests of all the banks are involved" (p. 37, *infra*).

WHEREFORE, Your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this cause, and that said cause may be reviewed and determined by this Court, and that the judgment of said Court of Appeals may be reversed and set aside; and for such further relief and rem-

edy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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OPINIONS BELOW.

One of the opinions of the United States Court of Appeals for the District of Columbia Circuit in this case, (reproduced on pp. 29-37, *infra*) is reported in 81 U.S. App. D.C. 200, 156 F. 2d 843, and the other (R. 106-113) is not yet reported. The first opinion of the Board of Tax Appeals for the District of Columbia in this case is reported in 73 W.L.R. 1025, and the second opinion is reported in 76 W.L.R. 533.

GROUNDS OF JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are:

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of the Constitution and a statute enacted by the Congress of the United States which has not been, but should be, settled by this Court.

2. The United States Court of Appeals has not given proper effect to the decisions of this Court applicable to the question decided.

3. The United States Court of Appeals has decided an important question of law involving the Constitution and a statute of the United States applicable to the District of Columbia, which decision is in conflict with its own prior decisions and with the decisions of this Court relating to the power of Congress.

STATEMENT OF THE CASE.

The case is sufficiently stated in the petition (pp. 1-11, *supra.*)

Provisions of Constitution and of Statutes Involved.

Art. I, Sec. 8, Cl. 17, of the Constitution provides, insofar as here pertinent, that:

> "The Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * * "

The Fifth Amendment to the Constitution provides, insofar as here pertinent, that:

> "No person shall be * * * deprived of life-liberty, or property, without due process of law * * * "

Sec. 6, par. 5, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, as amended by Title IV, Sec. 2, of the Act of July 26, 1939, 53 Stat. 1107, ch. 367 (which, as amended, appears as Sec. 47-1701, D.C. Code, 1940), provides, insofar as here pertinent, that:

> "Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, * * * shall make affidavit to the board of personal-tax appraisers on or before the 1st day of August each year as to the amount of its or their gross earnings * * * for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay

to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings * * * ."

Sec. 6, par. 7, of the Act of July 1, 1902, 32 Stat. 619, ch. 1352, provides that:

> "Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the 30th day of June preceding."

By the Act of April 28, 1904, 33 Stat. 564, ch. 1815, to said paragraph 7, *supra,* was added a new paragraph reading as follows:

> "Incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June 30th, and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum."

As amended, said paragraph 7 is codified as Sec. 47-1703, D.C. Code, 1940.

ARGUMENT.

The question is important.

The Court below has either misconstrued the statutes involved or it has applied to those statutes or their administration incorrect criteria of constitutionality.

The Court of Appeals, as was hereinbefore stated, rejected the contention of the District that national banks are taxable only under Sec. 1701 because the words "national banks" occur in that section only, and that therefore no administrative official has power to classify them under Sec. 1703. The Court apparently concluded that Congress did not intend to tax national banks under Sec. 1701 subsequent to the amendment of 1904. In reaching this conclusion the Court said that after the amendment of 1904 to Sec. 1703 "Congress has said nothing more, except that in 1904 it provided for a lower rate of taxation on 'incorporated savings banks paying interest to their depositors'." (R. 112.) That observation of the Court ignores certain facts which we believe pertinent, viz.:

1. The matter of the situation with respect to the taxation of banking institutions in the District was thoroughly discussed in a Committee Print of the Senate Committee on the District of Columbia, 72nd Congress, 1st Session, entitled "Taxation of Public Utility Corporations and Other Corporations in the District of Columbia" (R. 47, 48);

2. In 1939 the taxation of banks and trust companies in the District was discussed in a document entitled "District of Columbia Tax Study" (House Document No. 108, 76th Cong., 1st Session); and

3. Yet, in 1939 Congress reenacted Sec. 1701 with amendments with respect to the tax on public utility companies but not with respect to the tax on "national banks" and "all other incorporated banks."[6]

The Court apparently concluded that Congress did not intend national banks to be taxed under Sec. 1701 by reasoning that such a construction of the statutes, i. e., to give preferential tax treatment to "state banks over national banks substantially identical in every particular would be at war with the clear Congressional purpose expressed in § 5219 of the Revised Statutes, 12 U.S.C.A. § 548, where it is

[6] Act of July 26, 1939, 53 Stat. 1085, 1107, ch. 367.

carefully provided that no state may tax a national bank's earnings at a higher rate than it taxes such earnings of state banks" (R. 112). And yet it is significant, we believe, that national banks are not the only banking institutions subjected to tax by Congress under Sec. 1701; also subject to tax under that statute are "trust companies" and "all other incorporated banks." Following the reasoning of the Court below, national banks and "incorporated savings banks" would be accorded preferential tax treatment over trust companies and "all other incorporated banks" in the District. And this would be true in spite of the fact that it is common knowledge that, to a very great extent, trust companies in the District engage in substantially the same type of business as do national banks and other banks. We say this because certainly Sec. 5219 R.S. could not be said to be indicative of any Congressional intention with respect to the taxation of "trust companies" and "all other incorporated banks."

The District contended, as was hereinbefore indicated, that national banks are taxable only under Sec. 1701 where they are specifically named for purposes of classification. In the cases involving the seven non-national banks the District contended that if there was discrimination in the taxation of national banks and non-national banks in the District that discrimination could be eliminated by affirming the action of the Assessor who taxed the seven non-national banks as "other incorporated banks" under Sec. 1701. Such a construction would not do violence to the plain language of Sec. 1701. But to eliminate any discrimination by ignoring the action of Congress in classifying national banks for tax under Sec. 1701 and directing such banks to be taxed under Sec. 1703 as if they were "incorporated savings banks" has the effect of judicially repealing Sec. 1701 insofar as that section taxes national banks.

The District has petitioned for a writ of certiorari in the seven non-national bank cases in order that this Court may

have the whole picture before it for consideration. The aspects of the situation with respect to the taxation of a national bank and the non-national banks are presented to this Court. Inherent in the matter, although not yet having been considered by either the Board of Tax Appeals or the Court of Appeals, is the question of the taxation of trust companies in the District. In view of these facts it is apparent that the question in this case and in the seven non-national bank cases is of paramount importance. In the words of the Court below in the first appeal in this case: "The interests of all the banks are involved" (p. —, *infra*). Not only are the interests of all the banks involved, but the District has a very substantial interest in the matter since under the decision of the Court below every national bank in the District of Columbia must now be, although they never have been prior to the decision in this case, taxed at 4% of their gross earnings less the amount paid as interest to their depositors. The decrease in the revenue of the District, if the decision of the lower Court in this case remains, will be very great.

Furthermore, endless confusion and difficulty in the administration of the statute involved will result from the opinion of the Court below if that opinion is not corrected by this Court. In disposing of this case, the Court of Appeals stated that "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions * * *, the national banks in the District * * * must be classified and taxed in the same manner" (R. 113). The fact is that by its affirmance of the decisions of the Board in the seven non-national bank cases the Court has prevented the "taxing authorities of the District of Columbia," if by that term it refers to the Assessor of the District of Columbia, from taxing the non-national banks at the same rate as Congress has declared in Sec. 1701 national banks, other incorporated banks and trust com-

panies should be taxed. The Court of Appeals reversed the decision of the Board in the first appeal in this case with instructions to the Board "to cancel the present assessment unless the tax Assessor, upon a reexamination of the entire subject of taxing banks under these statutes, removes the discriminations presently existing, in which latter event the validity of his further proposals may be considered" (p. 37, *infra*). The Assessor of the District of Columbia removed the discrimination found by the Court by taxing every bank in the District of Columbia, national and non-national, at 6%, under Sec. 1701, upon its gross earnings without any deduction for interest paid depositors. That was the situation at the time of the second appeal in this case and the appeals in the seven non-national bank cases. In its second opinion the Court below found that it was "the Board of Tax Appeals and not the Congress which has discriminated against national banks" (R. 111). Thus, while the Court ordered the Assessor to remove the discriminations, it later found that it was not the Assessor at all, but the Board, which had made the discrimination.

But aside from any question of the interests of all the banks or the District Government or of administrative difficulties, the question is important because, as we contend, the opinion of the Court below contains far-reaching but erroneous criteria of constitutionality to be applied to acts of the Federal Congress.

The opinion of the lower Court in this case is not only inconsistent with certain of the opinions expressed by it in other cases, but is, as well, in direct conflict with opinions of this Court.

The United States Court of Appeals for the District of Columbia Circuit held in *Neild et al.* v. *District of Columbia*[7] that: "The Fourteenth Amendment is not applicable in the District of Columbia. To the extent that the privilege of 'equal protection of the laws' exists in the District

[7] 71 App. D. C. 306, 316, 110 F. 2d 246.

of Columbia it depends upon the due process clause of the Fifth Amendment and other provisions of the Constitution which are applicable to the federal government. In a sense it may be said that every citizen is entitled to the equal protection of the laws as they may be adopted and administered by the federal government throughout the land. But this privilege does not depend upon or arise out of the Fourteenth Amendment. The nature and purpose of the federal government require that it be 'subject to restraints less narrow and confining' than the individual states. This is particularly true concerning the area in which the national capital is located."

In the first appeal in this case the Court below declared that: "The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and caprious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment." (p. 33, *infra.*)

In the first appeal of Hamilton the Court below found that the "classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid" (p. 32, *infra*).

But in this case, the second appeal of Hamilton, the Court below held:

> "Even if the language of the two Code provisions involved permitted the interpretation which the Board has given it (i.e., that national banks are taxable under Sec. 1701 and the non-national banks under Sec. 1703), such a construction which obviously results in oppressive discrimina-

tion against national banks would render the two sections unconstitutional, for it denies to national banks the due process guaranteed by the Fifth Amendment and the equal protection of the laws implied therein for the benefit of the inhabitants of the District of Columbia." (R. 112.) (Parenthetical matter supplied.)

In elaborating on this point in its opinion, the majority of the Court below went on to declare that:

> "In spite of the fact that under the settled rule equal protection of the laws is not afforded by the Fifth Amendment, it is true, and ought to be true, that 'The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws.' *Sims* v. *Rives*, 66 App. D.C. 24, 84 F. (2) 871 (1936); *Lappin* v. *District of Columbia*, 22 App. D.C. 68 (1903). We say this is true because this court so held in the two cases just cited. We say it ought to be true because the due process of the Fifth Amendment should include or imply for the inhabitants of the District of Columbia equal protection of the laws enacted by Congress as the local legislature of the District. It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the 'equal protection' clause of the Fourteenth Amendment if it does the same thing." (R. 113.)

Thus the opinion in this case has overruled the theory, stated in the *Neild* case, *supra*, that "The nature and purpose of the federal government require that it be 'subject to restraints less narrow and confining' than the individual states", and has held that when Congress legislates for the District of Columbia (not, as the Court said, as "the local

legislature" but as a legislature of national character[8]) it violates "the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the 'equal protection' clause of the Fourteenth Amendment if it does the same thing." (R. 113.)

Furthermore, it is submitted that the theory of implying equal protection of the laws under the Fifth Amendment in a tax case for the purpose of determining the validity of a classification made by the Federal Congress is in direct conflict with the decisions of this Court.

This Court has made very clear the rules to be applied in determining the constitutionality of classifications for tax purposes made by the Federal Congress. It has said that "The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation."[9] Speaking of the power of Congress to make classifications in tax statutes, this Court said that:

> "The Fifth Amendment unlike the Fourteenth has no equal protection clause. * * * But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. * * * They may tax some kinds of property at one rate, and others at another, and exempt others altogether. * * * They may lay an excise on the operations of a particular kind of business, and exempt some

[8] *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 429, 5 L. Ed. 257: "* * * Congress is not a local legislature, but exercises this particular power like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution." See also *Capital Traction Co.* v. *Hob*, 174 U. S. 1, 5, 43 L. Ed. 873, 19 S. Ct. 580.

[9] *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392, 65 L. Ed. 998, 41 S. Ct. 528.

> other kind of business closely akin thereto. * * * If this latitude of judgment is lawful for the states, it is lawful, *a fortiori*, in legislation by the Congress, which is subject to restraints less narrow and confining. * * * " *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584, 81 L. Ed. 1279, 57 S. Ct. 883.

And, as if to put an end to any question of equal protection being afforded by the Fifth Amendment under tax statutes enacted by Congress, this court has recently (1941) stated unequivocally that "A claim of unreasonable classification or inequality in the incidence or *application* of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." (Emphasis supplied.)[10]

Assuming Judge Edgerton to be correct in his view that Congress intends national banks, which are expressly named in Sec. 1701, to be taxed thereunder, and further assuming, *arguendo*, that Congress made an unwise choice in such classification, it would seem that nevertheless "such classification is a legislative, not a judicial function."[11] The Court below succinctly stated the function of courts where questions of classification in tax statutes arise when it stated in the *Neild* case as follows:

> "While the power of selection for classification is not an arbitrary one but must, instead, rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed nevertheless, such classification is a legislative, not a judicial function. The determination which is made by the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that

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[10] *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468, 86 L. Ed. 343, 62 S. Ct. 341, citing *LaBelle Iron Works* v. *United States*, *supra*, and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907.

[11] *Neild et al.* v. *District of Columbia*, *supra*, p. 320.

possibility. The function of the court is only to determine whether it is possible to say that the legislative decision is without rational basis. As the Supreme Court has said, concerning state taxing statutes: 'It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the [Supreme] Court make this abundantly clear.' ''

Without conceding that Judge Edgerton was correct in his opinion that "Congress intends state banks that do a savings business to be taxed under § 1703 although they also do a commercial business" (R. 113), we nevertheless respectfully submit that he was undoubtedly correct when he declared that "The power of Congress to tax state banks and national banks differently" is "as plain as the power to tax corporations and partnerships differently" (R. 113).[12]

While the instant case is concerned with a tax statute, the Court did not confine to such cases its theory that the Fifth Amendment implies equal protection. It is apparent, therefore, that such test of constitutionality, if the decision of the lower Court is permitted to remain, is applicable to every statute enacted by the Federal Congress in the exercise of its exclusive legislative power over the District of Columbia.

CONCLUSION.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory

[12] *Cf. Mercury Press, Inc.* v. *District of Columbia*, —— U. S. App. D. C ——, 173 F. 2d 636, cert. den. —— U. S. ——.

powers, in order that a proper construction of the Constitution and of the Act of Congress involved may be had, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia Circuit and finally reverse it.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Hamilton National Bank v. District of Columbia (1946), 81 U. S. App. D. C. 200, 156 F. 2d 843.

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 9192

HAMILTON NATIONAL BANK, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

On Petition for Review of Decision of the Board of Tax Appeals for the District of Columbia

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Argued May 28, 1946. Decided June 28, 1946.

Mr. Roger J. Whiteford, with whom *Mr. Philip S. Peyser* was on the brief, for petitioner.

Mr. Harry L. Walker, Assistant Corporation Counsel, District of Columbia, with whom *Mr. Vernon E. West,* Corporation Counsel, District of Columbia, and *Mr. Chester H. Gray,* Principal Assistant Corporation Counsel, District of Columbia, were on the brief, for respondent.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

PRETTYMAN, J.: Petitioner is a national bank doing business in the District of Columbia. There are in the District other national banks and also banks incorporated

under various state laws. Some of these banks, both national and state, have savings departments and pay interest to savings depositors. These same banks do a general commercial banking business.

Two pertinent statutes impose taxes on banks in the District of Columbia. One provides that every national bank and all other incorporated banks shall pay 6 per cent a year on their gross earnings.[1] The other provides that incorporated savings banks shall pay 4 per cent a year on their gross earnings less the interest paid to their depositors.[2] The first was enacted in 1902 and the second in 1904.

The local taxing authorities treat banks incorporated under state laws as incorporated savings banks and treat national banks as not savings banks. Petitioner protested its assessment, claiming the right to deduct from its gross earnings the interest paid its depositors. The Board of Tax Appeals for the District of Columbia affirmed the Assessor. Petition for review of that decision by this court was then filed.

Petitioner makes three contentions. The first is that interest paid depositors on savings accounts is deductible in computing gross earnings, under the doctrine of *District of Columbia* v. *Georgetown Gaslight Co.*, 45 App. D. C. 63 (1916), and *Chesapeake & Potomac Telephone Co.* v. *District of Columbia*, 78 U. S. App. D. C. 53, 137 F. 2d 674 (1943). In the *Georgetown Gaslight Company* case, this court held that the cost of raw materials used in manufacture is deductible from gross receipts in computing gross earnings. In the *Telephone Company* case, this court applied the same doctrine to the cost of telephone directories supplied subscribers by the company. But we are not disposed to extend the doctrine of those cases. Gross receipts, gross income, and net income are different concepts. We need not venture too far into the discussion

[1] D. C. Code (1940) § 47-1701.
[2] D. C. Code (1940) § 47-1703.

which has engulfed the subject for a half-century.[3] Receipts differ from income as a matter of economic concept and constitutional importance, the former including capital and the latter not. Gross income becomes net by deductions. "Gross earnings" is not so certain in meaning but, generally speaking, means gross income. In this scheme of things, the cost of raw materials is eliminated from receipts to ascertain income, because income is gain and no gain is derived until cost of goods is recovered. In this same scheme of things, interest paid is, by established practice, a deduction from gross income in the computation of net income. Interest paid by banks on savings accounts is so treated.[4] Petitioner's contention is, in ultimate substance, either that interest on savings accounts is an elimination from receipts in the computation of gross income, or that gross earnings differ from gross income in that items like this interest must be eliminated from the latter to ascertain the former. It argues that interest paid depositors is to a bank the cost of its raw material, *i.e.*, money; or at least the same sort of an item as a telephone book to a telephone company. The rationale of the rule is difficult to state,[5] but we are not disposed to depart from the traditional treatment of the item. The same result is indicated by the provision of the Code here involved, which refers to "gross earnings, less the amount paid as interest to their depositors", when the deduction of interest was intended. We agree with the Board of Tax Appeals that this interest falls within the deductions from gross income or gross earnings in the computation of net income, rather than among the eliminations which must be made from gross receipts in order to ascertain income or earnings.

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[3] *See* 1 MERTENS, LAW OF FEDERAL INCOME TAXATION (1942) c. 5.

[4] *See* U. S. Treas. Reg. 111, § 29.23(b)-1; First National Bank of Braddock, 28 B. T. A. 1244 (1938).

[5] For federal income tax purposes, cost of goods sold is determined for mercantile and manufacturing companies by the use of inventories. The Treasury includes as raw materials those which have been acquired for sale or which will physically become part of merchandise intended for sale. U. S. Treas. Reg. 111, § 29.22(c)-1. *See* Francisco Sugar Co. v. Comm'r, 47 F. 2d 555 (C. C. A. 2d, 1931); Burroughs Adding Machine Co., 9 B. T. A. 938 (1927).

Petitioner's second contention is that the difference in treatment accorded by the taxing authorities to national banks and state banks is an illegal discrimination which voids the tax upon petitioner. It is apparent that the 1904 act was intended to subject incorporated savings banks to a tax different from the tax imposed on other incorporated banks, including national banks. This classification of banks by the Congress for tax purposes rested upon reasonable differentials and was, therefore, valid. The questions are three: Was the test used by the administrative officers for determining what is a savings bank proper? If improper, was the test so improper as to be invalid? If the administrative action is invalid, what, if any, remedy is available to a national bank?

We do not think that the simple ascertainment of whether a bank has a national charter or a state charter is a proper method of determining whether the bank is or is not an incorporated savings bank. The test should have some relation to savings deposits. If state banks engaged in the savings-account business and national banks did not, the nature of the charter might be an easy rule of thumb for identifying a savings bank, or might be an inevitable coincidence with the fact of being a savings bank. But such is not the case. National banks are fully authorized to receive savings deposits and to pay interest on them.[6] This petitioner has time and savings deposits as large as, if not larger than, the similar deposits of the state banks classified as savings banks for tax purposes. On the other hand, the state banks do a general commercial banking business just as do the national banks; none is engaged exclusively in receiving and investing savings deposits. The charter powers of the several banks, national and state, vary in detail, but appear to be substantially equivalent in respects pertinent here. All are under the same regulatory control, the Comp-

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[6] 12 U. S. C. A. § 371.

troller of the Currency.[7] The rates of interest paid savings depositors are "pretty much uniform". The evidence upon the hearing was that so far as commercial and savings accounts are concerned the business is identical. So that, so far as savings deposits are concerned, there is no difference between the national banks and the state banks. For that reason, we do not think that an administrative classification of state banks as savings banks, and national banks as not savings banks, is proper. As we said in *Neild* v. *District of Columbia*,[8] in discussing Congressional power, the selection for classification must "rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed". As we said again, in *A-C Inv. Ass'n* v. *Helvering*,[9] discussing what is a savings bank under the federal income tax law, the answer is reached "by viewing what was actually done." Legally speaking, the test applied by the administrative authorities in the case at bar is arbitrary.

The next question is whether the administrative action is so improper as to be invalid. The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states.[10] The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. The Supreme Court has held as settled that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due-process clause,[11] and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment.[12] But we are not considering the validity of an act of Congress and need not go into the question

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[7] D. C. Code (1940) § 26-101.
[8] 71 App. D. C. 306, 110 F. 2d 246 (1940).
[9] 62 App. D. C. 339, 68 F. 2d 386 (1933).
[10] *Wight* v. *Davidson*, 181 U. S. 371, 45 L. Ed. 900, 21 S. Ct. 616 (1901).
[11] *Heiner* v. *Donnan*, 285 U. S. 312, 326, 76 L. Ed. 772, 52 S. Ct. 358 (1932).
[12] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585, 81 L. Ed. 1279, 57 S. Ct. 883 (1937); *see Neild* v. *District of Columbia*, *supra*.

whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter. The matter before us is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of the Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which "operates to create a rule out of harmony with the statute, is a mere nullity."[13] We do not think that an administrative officer can restrict a statutory term such as "incorporated savings bank" by a definition having no relation to savings deposits or accounts. He cannot eliminate, by administrative definition, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition. His attempt to do so is invalid as not in harmony with the statute.

In the view which we take of the case, it is not necessary for us to define an incorporated savings bank. "Until recently," the Supreme Court said in 1878,[14] the primary idea of a savings bank was an institution in the hands of disinterested persons, the profits of which inured wholly to the benefit of the depositors. It was, said the Court, quasi benevolent. That case concerned a savings bank in the District of Columbia incorporated by an act of Congress, and called the "National Union Savings-Bank of the District of Columbia". In 1883 the Supreme Court of the District of Columbia considered a case [15] in which an incorporated savings bank was converted by its trustees into a national banking association, pursuant to Section 5154 of the Revised Statutes and an act of June 30, 1876.[16] The

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[13] *Manhattan Co.* v. *Comm'r*, 297 U. S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

[14] *Huntington* v. *Nat. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777 (1878).

[15] *Keyser* v. *Hitz*, 2 Mackey 473 (1883).

[16] 19 Stat. 64.

latter act provided that "all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks:".[17] The court thought that there might be a question whether that act did not, by its own operation, and without the necessity of any action by the banks, convert the savings banks in the District of Columbia at once into national banks, but said that the practical interpretation of the act had been for the banks themselves to take some action of conversion. Historically, therefore, in the District of Columbia there is no incongruity between savings bank and national bank.

We have now to consider the disposition of the case. The fact that the administrative classification of banks is invalid does not, of itself, determine whether all these banks having identical savings-deposit businesses are or are not incorporated savings banks within the meaning of the statute. Respondent contends, and the Board of Tax Appeals held, that petitioner could not complain of the discrimination because the banks favored by the administrative practice are not in the proceeding. That position is obviously without merit. The person discriminated against is really the only person who can complain of the discrimination. Certainly he is the only one who does.

While, as we have said, the equal-protection clause does not apply here, the course followed by the Supreme Court in disposing of cases wherein administrative action has been held invalid because of that clause, furnishes a guide for

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[17] The quoted provision of the 1876 act was included in the 1901 Code, Section 713, but was omitted in an amendatory enactment of June 30, 1902 (32 Stat. 534). We have been unable to find any helpful legislative history relating to this amendment. Various statutes relating to national banks were extended to apply to savings banks in the District of Columbia by an act of March 4, 1933 (47 Stat. 1566, D. C. Code (1940) § 26-104).

our action here. In *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923), and again in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133 (1931), the Court, faced with this same dilemma, directed that the higher tax be reduced to the level of the favored taxpayers. Chief Justice Taft, in the former case, said that this should be done "even though this is a departure from the requirement of statute." He said:

> "The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The difference in treatment accorded the national banks and the state banks, reflected in the record in the case at bar, is not a mistake or an error in judgment; it was shown to be consciously done, and in that sense intentional, and systematic.[18]

But our relation to the Board of Tax Appeals of the District of Columbia is more flexible than the relationship of the Supreme Court to the courts of the several states, and permits of directives as well as the usual appellate dispositions. The Board is "a constituent member of the assessing authority."[19] Our power to review its decisions is "as under the equity practice in which the whole case, both facts and law, is open for consideration",[20]—"the scope of a review of an equity court." The definition of "incorporated savings bank" is not merely the temporary disposition of the

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[18] *Charleston Ass'n* v. *Alderson*, 324 U. S. 182, 190, 89 L. Ed. 621, 65 S. Ct. 624 (1945).

[19] *Watrous* v. *District of Columbia*, 77 U. S. App. D. C. 295, 135 F. 2d 654 (1943).

[20] *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406 (1944).

single assessment in the present proceeding but obviously concerns the taxation of the entire group of local banks as a continuing matter. The interests of all the banks are involved. The facts of the situation in 1904 when Congress enacted the special statute relating to incorporated savings banks, are pertinent. The various statutes which interrelate the local savings banks with the national banking laws would appear to have a bearing. The Comptroller of the Currency, under whose supervision all these banks operate, may have important interests in the subject or views which may be valuable. This factual data is by no means complete in the record before us. Moreover, the matter is of the sort which should first be crystallized by administrative action. The decision of the Board in this case will be reversed and the case remanded, with instructions to cancel the present assessment unless the tax Assessor, upon a reexamination of the entire subject of taxing banks under these statutes, removes the discriminations presently existing, in which latter event the validity of his further proposals may be considered.

Petitioner's third contention is that the proposed tax is a discrimination violative of Section 5219 of the Revised Statutes.[21] But that statute is addressed to the legislatures of the states, and the statutes with which we are concerned are acts of the Congress. Section 5219 is of value here as an indication of Congressional policy. To that extent petitioner's contention is sound. Our view of the case is in accord with that policy. But the section is not controlling in terms. Congress could, if it chose, tax national banks without regard to its provisions.

Reversed and remanded for further proceedings in accordance with this opinion.

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[21] 12 U. S. C. A. § 548.